

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES POSTAL SERVICE,	)	
	)	
Respondent,	)	
	)	
and	)	Case 28-CA-175106
	)	
RICHARD SANTIAGO	)	
	)	
An Individual	)	

**RESPONDENT'S MOTION TO RECONSIDER  
THE EXECUTIVE ADMINISTRATIVE SECRETARY'S DENIAL  
OF RESPONDENT'S MOTION FOR EXTENSION OF TIME  
TO FILE EXCEPTIONS**

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Respondent, United States Postal Service (“Postal Service” or “Respondent”), pursuant to Section 102.48(c) of the Board’s Rules and Regulations, as amended, hereby requests reconsideration of its Motion for an Extension of Time to File Exceptions in the above-captioned matter, which was denied by the Associate Executive Secretary on July 9, 2018.

**A. PROCEDURAL BACKGROUND**

The Administrative Law Judge issued her decision in the above-referenced charge on March 9, 2018, finding unlawful four Postal Service work rules – i.e., (1) a nationwide rule prohibiting employees from using information resources<sup>1</sup> to “disclos[e] any Postal Service information that is not otherwise public without authorized management approval,” (2) a nationwide rule prohibiting employees from using information resources to “perform[] any act that may discredit, defame, libel, abuse, embarrass, tarnish, present a bad image of, or portray in false light the Postal Service, its personnel, business partners, or customers,” (3) a nationwide rule requiring employees to “cooperate in any postal investigation, including Office of Inspector General investigations,” and (4) a Nevada-Sierra District rule prohibiting employees from “fail[ing] to cooperate in, or the impeding of, any Postal inspection or investigation.” Exhibit 1, pp. 8 [lines 29-30], 9 [lines 38-40] and 10 [lines 25-29].

By Order dated March 27, 2018, the time to file exceptions was extended to May 7, 2018. Exhibit 2. Respondent’s counsel, Dallas Kingsbury, who is domiciled in Las Vegas, NV, e-filed Respondent’s Exceptions at 9:46 p.m. PT on Monday, May 7, 2018. Exhibit 3. By facsimile, dated May 8, 2018, the NLRB’s Associate Executive Secretary

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<sup>1</sup> As the ALJ stated in her decision, “information resources” are “understood to refer to networks, systems, workstations, servers, routers, applications, databases, websites, online collaboration environments, and the like.” ALJ Decision at p. 8 [lines 19-21].

notified Mr. Kingsbury that Respondent's Exceptions were received by the NLRB in Washington, DC, at 12:46 a.m. on May 8, 2018, and was therefore not timely filed.

Exhibit 4. Mr. Kingsbury then filed a Motion for Extension of Time to File Exceptions on May 10, 2018. Exhibit 5. In the motion, Mr. Kingsbury explained that he had missed the filing deadline because of the "double duty" that he was putting in at home and work as a result of his wife's accident and resulting surgery in the days leading up to the filing deadline. Exhibit 3, p. 2. In the affidavit that he attached in support of his motion, Mr. Kingsbury averred as follows:

5. My wife had a severe fall at home, which resulted in both a broken ankle and fibula. As a result, she has surgery on Thursday, May 3, 2018, and I've been doing double duty as caregiver while trying to keep up with work, necessitating in long work days and working after hours.
6. Due to the distractions of my wife's medical condition I miscalculated the time the Exceptions were due and filed well before midnight Las Vegas time (9:46 PM) but after midnight East Coast time at the offices of the NLRB.
7. Accepting Respondent's Exceptions out of time should not result in undue prejudice.

Id. at p. 4.

By letter dated July 9, 2018, the NLRB's Associate Executive Secretary notified Mr. Kingsbury that Respondent's Motion for Extension of Time to File Exceptions was denied, stating only that "[t]he reasons for the late filing do not rise to the level of excusable neglect" and citing Unitec Elevator Services Co., 337 NLRB 426 (2002).

Exhibit 6. In the absence of any explanation or rationale for the Secretary's decision, a review of the applicable law is necessary.

## **B. APPLICABLE LAW**

The NLRB's rules and regulations state that e-filed documents, including exceptions, "must be received by 11:59 p.m. of the time zone of the receiving office." 29 C.F.R. § 102.2(b). The NLRB's rules and regulations further state that exceptions "may be filed within a reasonable time after the time prescribed by these Rules only upon good cause shown based on excusable neglect and when no undue prejudice would result." 29 C.F.R. § 102.2(d)(1)(emphasis added). A party seeking to file such documents beyond the time prescribed by these Rules must file a motion that states the grounds relied on for requesting permission to file untimely and "facts relied on to support the motion must be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts." 29 C.F.R. § 102.2(d)(2).

Originally, the NLRB followed Section 10(e) of the Act and accepted only those late filings that were caused by "extraordinary circumstances." During this period of time, the NLRB rendered several decisions accepting untimely filed documents:

Magic Chef, Inc., 181 NLRB 1136 n. 1 (1970) (accepting the Charging Party's exceptions, filed more than two weeks late, where it had timely filed the supporting brief, its failure to file the exceptions was an oversight and Respondent filed a thorough answering brief)

World Publishing Co., 220 NLRB 1065 n.2 (1975) (accepting the Charging Party's motion for extension of time to file exceptions, filed one business day after the exceptions were due, where the Charging Party's mailgram was not delivered until after the Board's closing hours and hand-delivered the motion the following day)

St. Bernadette's Nursing Home, 234 NLRB 835 n. 1 (1978) (accepting the General Counsel's and the Charging Party's exceptions, due on January 5<sup>th</sup>, where the exceptions were mailed in Philadelphia on January 4<sup>th</sup> and "in the normal course, they would have been delivered" on the due date)

New York Sheet Metal Works, Inc., 243 NLRB 967 (1979) (accepting Respondent's exceptions filed on November 13<sup>th</sup>, the date requested in its motion for an extension of time, where Respondent alleged it never received the Board's order limiting the extension until October 20<sup>th</sup>)

In 1992, the NLRB revised its rules and, in Section 102.111, added "excusable neglect" as the basis for accepting untimely filed documents. Within a year after this revision, the NLRB issued three decisions interpreting the parameters of "excusable neglect":

York Printing Company, 308 NLRB 983 (1992) (excusable neglect was established when Respondent filed its exceptions one day late because the exceptions were in luggage that was stolen)

United States Postal Service, 309 NLRB 305 (1992) (excusable neglect was established when Respondent filed its answering brief to the General Counsel's cross-exceptions one day late because the miscalculated date was placed on counsel's litigation calendar)

United States Postal Service, 312 NLRB 595 (1993) (excusable neglect was not established when Respondent thought it had 14 days, instead of 10 days, to file its answering brief)

In 1993, the Supreme Court issued the still-controlling decision interpreting the "excusable neglect" standard in Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure. Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993). That rule, in turn, was patterned after Federal Rule of Civil Procedure 6(b), which permitted federal courts to accept late-filed documents that were the "result of excusable neglect." In its decision, the Supreme Court rejected the Bankruptcy Court's interpretation that a party may claim excusable neglect only if its "failure to timely perform a duty was due to circumstances which beyond [its] reasonable [c]ontrol." As further explained by the Supreme Court:

There is, of course, a range of possible explanations for a party's failure to comply with a court-ordered filing deadline. At one end of the spectrum, a party may be prevented from complying by forces beyond its control, such as by an act of God or unforeseeable human intervention. At the other, a party simply may choose to flout a deadline. In between lie cases where a party may choose to miss a deadline although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse, as well as cases where a party misses a deadline through inadvertence, miscalculation, or negligence.

...

Hence, by empowering the courts to accept late filings 'where the failure to act was the result of excusable neglect,' Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

Id., at 388.

The Supreme Court then concluded that, when determining if a party's neglect of a deadline is "excusable," the Bankruptcy Court should take into account "all relevant circumstances surrounding the party's omission," including (1) the danger of prejudice to the debtor, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay and whether it was within reasonable control of the movant, and (4) whether the movant acted in good faith. Id., at 395. Based on these factors, the Supreme Court ruled that the Bankruptcy Court abused its discretion when it rejected the untimely filing by Respondent's counsel, who averred that he was unaware of the August 3, 1989, deadline because it came at a time when he was experiencing "a major and significant disruption" in his professional life caused by his withdrawal from his former law firm on July 31, 1989. Id., at p. 384.



In 2002, the NLRB issued a decision, accepting Respondent's answering brief that was filed one business day late, but then clarifying the NLRB's standard for determining "excusable neglect." Unitec Elevator Services Co., 337 NLRB 426 (2002). Specifically, the NLRB stated ...

Consistent with *Pioneer* and these court decisions, the Board has generally held that inattentiveness or carelessness, absent other circumstances or further explanation, will not excuse a late filing. However, the Board has done so in unpublished decisions. Further, the Board has never indicated that parties should no longer rely on *Postal Service* [309 NLRB 305 (1992)]. Although the Board's 1993 decision in *United Parcel Service*, *supra*, can be interpreted as overruling *Postal Service*, the Board did not specifically state that was its intention. Indeed, many parties continue to cite *Postal Service* as warranting acceptance of a 1-day late brief. Finally, the Board has not strictly enforced the requirement that a motion to file out of time be supported by affidavit.

We have decided to correct this today by expressly overruling *Postal Service* and clarifying the Board's policy. The Board's Rules, at Section 102.111, describe in specific detail how to count or compute the days in establishing the due date. Henceforth, a late document will not be excused when the reason for the tardiness is solely a miscalculation of the filing date. Additionally, in all matters raising excusable neglect issues we will strictly adhere to our rule that the specific facts relied on to support the motion to accept a late filing shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. Failure to submit the facts in an affidavit will result in rejection of the Motion.

Id., at 427-428 (emphasis added).

Although Respondent is not aware of cases since Unitec Elevator Services Co. where the Board has accepted a late filing based on excusable neglect, the Board has adopted two ALJ decisions post-Unitec where the ALJ accepted a late filed post-hearing brief. Southern California Gas Co., 346 NLRB 449 (2006)(filed one day late); Remington Lodging & Hospitality, 359 NLRB 803 (2013)(e-filed 21 minutes late). As set forth in more detail by the ALJ in the latter decision:

In my view, to reject the Respondent's original brief filed 21 minutes late would be to elevate form over substance. This case took 40 days to try and the record consists of over 7000 pages, with hundreds of exhibits. To deny the Respondent the ability to argue its position in such a massive case in a posthearing brief would be unnecessarily harsh. Counsel has offered a plausible explanation for the late filing of the original brief, and I have no reason to doubt his assertions. Further, I conclude that counsel for the General Counsel was not prejudiced by the filing of the Respondent's brief a mere 21 minutes late. Accordingly, I hereby deny counsel for the General Counsel's motion to strike and accept the Respondent's original brief as received at the Division of Judges at 12:21 a.m. on April 12, 2011.

Id., at p. 813.

The NLRB revised its rules again, effective March 7, 2017, moving the “excusable neglect” standard from Section 102.111 to Section 102.2(b).

**C. ARGUMENT**

A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. 29 C.F.R. § 102.48(c). A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. 29 C.F.R. § 102.48(c)(1). Based on the facts set forth in Mr. Kingsbury’s supporting affidavit and the applicable law, above, Respondent has established “excusable neglect” sufficient to justify the acceptance of Respondent’s untimely filed exceptions.

1. Excusable Neglect Is Established Under Unitec Elevator Services, Inc.

Although the Associate Executive Secretary relied upon Unitec to reject Mr. Kingsbury’s request for an extension of time to file exceptions, nothing about that case

supported, much less compelled, a conclusion that a request for an extension of time was not well-taken. While it is true that the Board will not excuse late filings of documents when the reason for the tardiness is solely a miscalculation of the filing date, and likewise will not excuse “inattentiveness or carelessness, absent other circumstances or further explanation,” see Unitec, the circumstances of the instant case do not fit either of those categories.

As Mr. Kingsbury explained in his motion, as supported by the facts established in the affidavit that accompanied that motion, Mr. Kingsbury’s wife had a severe fall at home, breaking her ankle and fibula, on Thursday – four days (two business days) – prior to the Monday due date for filing the exceptions. This injury further required Mr. Kingsbury’s wife to undergo surgery, and required Mr. Kingsbury to take time to be at the surgery and to care for his wife after leaving the hospital. In Mr. Kingsbury’s words, he was “doing double duty as caregiver while trying to keep up with work, necessitating in long work days and working after hours.” Although the distractions of this situation *also* caused Mr. Kingsbury to miscalculate the deadline as before midnight PT rather than as before midnight ET, his miscalculation was not the *sole* reason why he was late, nor was his filing late (by all of 47 minutes) simply a result of him being inattentive or careless without explanation. Rather, he also was late because he was busy trying to care for his wife and work at the same time, and because he understandably was concerned for his wife’s welfare. While he attempted to keep up with his work, he was also distracted – as would be any husband under these circumstances.

Thus, the instant situation does not meet either of the situations that the Board enumerated in Unitec as justifying rejection of motions for extension of time. Rather,

the facts are in line with cases that have found excusable neglect. See Southern California Gas Co., supra (Board adopted ALJ decision excusing filing that was late by one day); Remington Lodging & Hospitality, supra (Board adopted ALJ decision excusing filing that was late by 21 minutes). See also Nagle v. Golden, No.1:16-CV-102, 2017 WL 4043936 (N.D.N.Y. 2017) (“excusable neglect” found when defendant Olmstead did not timely respond to a third-party complaint served on him on October 18, 2016, where “that same day he had to accompany his wife to the hospital for a scheduled pre-admission examination ... Thereafter, on October 19, 2016, Olmstead’s wife was admitted to the hospital for major surgery and was released on October 21, 2016 ... Olmstead’s wife was bedridden for nearly a month and Olmstead’s time was consumed with caring for her”); Erickson v. Wells Fargo Bank, No. 09-11933, 2012 WL 4434740 (W.D. Texas 2012)(“excusable neglect” found when plaintiff Erickson did not timely file his notice of appeal because “the wife of Erickson’s attorney suffered serious injuries and had surgery in May 2011 an that, as a result, the attorney – a solo practitioner – was absent from his law office and his staff miscalendared the deadline ...”). Respondent asks the Board on reconsideration to find such excusable neglect here.

2. Alternatively, the Board Should Reconsider Unitec Elevator Services, Inc., Because it Impermissibly Restricts Excusable Neglect

To the extent the Board determines Unitec does not permit it to apply excusable neglect in this case, Respondent respectfully suggests that the decision interprets excusable neglect too narrowly and that the Board should reconsider its use of that standard. Specifically, as the Supreme Court held in Pioneer, courts are permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or

carelessness. In other words, the Court's decision presumes that some late filings will be excused and does not limit those occasions to acts of God or other circumstances beyond the party's control. To hold otherwise would effectively render the concept of "excusable neglect" a nullity.

That the Board itself has not found a single instance of excusable neglect since 2002 (though it has upheld ALJ's findings of excusable neglect in two instances) suggests it is applying an impermissibly restrictive interpretation of the excusable neglect standard. Indeed, under what circumstances would the Board find excusable neglect when applying the Unitec decision?

3. Excusable Neglect is Established Under the Factors Set Forth By the Supreme Court in Pioneer Investment Services, Inc.

The Supreme Court in Pioneer Investment Services Co. identified four factors when analyzing excusable neglect.

First, there is no "danger of prejudice" to the other parties. The General Counsel did not oppose Mr. Kingsbury's motion for an extension of time and no prejudice has been alleged by any party. As explained by ALJ Goldman in 2008, in which he found "excusable neglect" when Respondent's attorney filed the post-hearing brief one day late, "[t]he minimal delay in filing resulted in no prejudice to any party. For instance, it did not result in the Respondent having an opportunity to view the General Counsel's brief before finalizing its own, or in any other way prejudice the General Counsel." A. Gallo Contractors, Inc., 04-CA-35336, 2008 WL 449659 n. 2 (Feb. 14, 2008). To the contrary, it is the Postal Service that will be prejudiced if Mr. Kingsbury's motion for an extension of time is denied – resulting in a finding that four of its work rules are unlawful without any substantive review by the Board. See, e.g., Patrician Assisted Living

Facility, 339 NLRB 1153, 1158 (2003)(Member Schaumber dissenting)(“Section 102.121 of the Board's Rules and Regulations . . . provides that ‘[t]he rules and regulations in [Part 102] shall be liberally construed to effectuate the purposes and provisions of the Act.’ Surely one such purpose is to decide cases on their merits whenever possible.”).

Second, “the length of the delay and its potential impact on judicial proceedings” are as minimal as can be in this case. Mr. Kingsbury e-filed Respondent’s Exceptions 47 minutes after the 11:59 p.m. ET deadline. Indeed, given that the NLRB’s offices close well before midnight and do not re-open until the following morning, there can be no impact on the judicial proceedings. Regardless of whether Mr. Kingsbury e-filed the Exceptions at 11:59 p.m. on May 7<sup>th</sup> or at 12:46 a.m. on May 8<sup>th</sup>, the Exceptions would be sitting in an electronic folder and waiting for an NLRB employee to open them sometime the following morning. To deny Mr. Kingsbury’s motion for an extension of time under these circumstances would be, in the words of the ALJ in Remington Lodging & Hospitality, “to elevate form over substance.”

Third, the “reason for the delay, including whether it was within the reasonable control of the movant,” supports a finding of “excusable neglect.” Foremost, Mr. Kingsbury did not have any control over his wife’s fall and resulting injury. Furthermore, while he may have had some control over what he did during the next few days, while at the hospital or while back at home trying to juggle caring for his wife and working, he decidedly was distracted by those events. As set forth, above, Mr. Kingsbury’s late filing was not “solely a miscalculation of the filing date.”

Fourth, “whether the movant acted in good faith” likewise supports a finding of “excusable neglect.” Throughout the litigation of this case, which commenced with the filing of the initial charge on April 29, 2016, Mr. Kingsbury met every deadline. This included answering the complaint, participating in the hearing, filing a post-hearing brief, and filing a supplemental brief following the NLRB’s issuance of The Boeing Company decision. Even after the late-filed Exceptions were brought to his attention by the Board, Mr. Kingsbury filed his motion for an extension of time within two days. In short, Mr. Kingsbury has acted in good faith at all times in this case and in every case before the Board.

Accordingly, when balancing all of the relevant factors, excusable neglect is appropriate in this case.

For the aforementioned reasons, counsel for Respondent respectfully moves that the Board reconsider its Motion to accept Respondent’s Exceptions to the Administrative Law Judge’s Decision out of time.

Dated this 17<sup>th</sup> day of July, 2018.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> of July, 2018, I served the foregoing Motion to Reconsider the Denial of Respondent's Motion for Extension of Time to File Exceptions, unless otherwise indicated, via regular first-class mail as follows:

### **NATIONAL LABOR RELATIONS BOARD**

Gary Shinnors, Executive Secretary  
National Labor Relations Board  
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**(VIA E-FILING)**

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